

MEMORANDUM

TO: Treasury Legal

FROM: Nahomi Carlisle, Associate General Counsel

RE: Public Records Law – Effective January 1, 2017

DATE: November 15, 2016

The following is a brief summary of the provisions of the new version of the Public Records Law that will become effective on January 1, 2017. The new provisions will require some immediate action by the Treasury, in order to be in compliance by the effective date.

A summary of the law and the proposed amended regulations can be accessed using the following link: <https://www.sec.state.ma.us/pre/preupdates/updatesidx.htm>

New Public Records Law Provisions

1. **Records Access Officers:** The Treasury is required to designate one or more Records Access Officer (RAO). (c. 66§ 6A). The contact information for the RAO's must be posted in a conspicuous location in the office and on the Treasury's website. The contact information should include: name, title, business address, business telephone number, and business email address of each records access officer.
 - a. The RAO has a duty to:
 - 1) Coordinate the Treasury's response to requests for access to public records;
 - 2) Assist individuals seeking public records in identifying the records requested;
 - 3) Assist the custodian of records in preserving public records; and
 - 4) Prepare guidelines that enable requestors to make informed requests. The guidelines shall be updated periodically and shall include a list of categories of public records maintained by the Treasury.
2. **Public Records Request:** Request may be made to the RAO orally in person or a written request may be delivered by hand, via first class mail, or via electronic mail. (c. 66, § 10(a)) (Telephone request may be accepted at the discretion of the RAO.) In-person oral request will be deemed received on the day it was made, a written request will be deemed received on the first business day following electronic transmission or physical receipt by the RAO. The Treasury cannot require the requestor to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a fee waiver (c. 66, § 10(d)(viii))
3. **Documentation of Public Records Request:** The RAO must document each records request submitted. (c. 66,§6A(e)(i)-(ix)). The documentation must include: nature of, and date, request received, date on which a response is provided to requestor, date on which a

public record is provided to requestor, number of hours required to fulfill the request, fees charged to the requestor, if any, petitions submitted under c. 66, § 10(d)(iv), and requests appealed under c. 66, § 10A.

- i. the timer required to comply with supervisor of records orders under c. 66, § 10A
- ii. the final adjudication of any court proceedings under c. 66, § 10A(d)

The Secretary of the Commonwealth will collect such information from the Treasury annually and post the information on a website.

4. Annual Reports: The Treasury RAO shall report to the Secretary with respect to requests and responses to requests for each calendar year, by 5:00 p.m. on the last business day of each calendar year. The report must contain the following:

1. The nature of each request and the date on which each request was received;
2. The date on which a response is provided to the requestor;
3. The date on which a public record is provided to the requestor;
4. The number of hours required to fulfill the request;
5. Fees charged to the requester, if any;
6. Records access officer petitions to the Supervisor submitted under G. L. c. 66, §10(d)(iv) and 950 CMR 32.07(4)(g);
7. Requests appealed to the Supervisor under G. L. c. 66, §10A and 950 CMR 32.09(1);
8. The time required to comply with the Supervisor's orders under G. L. c. 66, §10A; and;
9. The final adjudication of any associated court proceedings under G. L. c. 66, §10A(d).

5. Treasury Website: When designing or acquiring an electronic record keeping system or database, the RAO shall consult with necessary personnel to ensure, that the system or database is capable of providing data in a commonly available electronic, machine readable format. The database design shall allow for, to the extent feasible, information storage and retrieval methods that permit the separation and retrieval of public records and redacting of exempt information in order to provide maximum public access. (c. 66, § 19(a))

The following must be available electronically on the Treasury website, and must be discoverable using a search feature on the website (c. 66, § 19(b)(i)-(ix):

- i. final opinions/decisions/orders/votes of TREASURY proceedings
- ii. annual reports
- iii. notices of regulations proposed under c. 30A
- iv. notices of hearings
- v. winning bids for public contracts
- vi. awards of federal, state, and municipal government grants
- vii. minutes of open meetings
- viii. agency budgets
- ix. and public record information of significant interest that the Treasury deems appropriate to post.

6. **Electronic Records:** Under the new version of the law, RAOs must provide public records to a requestor in an electronic format *unless* the record is not available in an electronic format or the requestor does not have the ability to receive or access the records in a useable electronic format. (c. 66, § 6A(d))

As an alternative to obtaining copies of records from a records access officer a person shall be permitted to, to the extent feasible, view and inspect records prior to obtaining copies; or use a personal device such as a camera or portable scanner to copy records within 10 business days.

7. **Response Time:** Under the current law, a records custodian must respond to a request for records in writing within 10 calendar days. Beginning January 1, 2017, a RAO must permit inspection or furnish a copy of a requested public record within **10 business days** following receipt of the request, provided that the following conditions have been met (c. 66, § 10(a) & (i)-(iii)):

- i. the request reasonably describes the public record sought
- ii. the record is within the possession, custody, or control of the Treasury
- iii. the RAO has received payment for the request

8. **Fees:** A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. the actual cost of any storage device or material provided to a person in response to a request for public records may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts.

If the Treasury is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the RAO may also include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than \$25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law. (c. 66, § 10(d) (i-iv))

A records access officer may delay provision of records until all fees related to such requests are paid in full by the person seeking access to the requested records in accordance with 950 CMR 32.08. And can deny a public records request from a requestor who has failed to compensate the Treasury for previously produced public records. (c. 66, § 10(d)(vi)).

The RAO cannot charge a fee if the RAO did not respond to the requestor within 10 business days. (c. 66, § 10(e))

9. **Available Remedies:** As of January 1, 2017, if the agency fails to comply with a requirement of the new law, the requestor may file an appeal with the Supervisor of Records

who will then issue a determination on the public status of the records within **10 business days** of receipt of the request for an appeal. (c. 66, § 10A). If an order from the Supervisor of Records is not complied with, the Supervisor of Records will notify the Attorney General and may take whatever measures necessary to ensure compliance. (c. 66, § 10A(b))

In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies. (c. 66, § 10(c)). If a requestor prevails in a court action against an agency or municipal RAO, the court may award the requestor attorney fees or costs. (c. 66, § 10A.(d) (2))

If the Treasury does not intend to provide a public record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency such that the agency cannot comply with the allocated time, the Treasury must inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response can be made via first class mail and the response must be in accordance to (c. 66, § 10(b)).

If the Treasury believes it cannot comply within 20 business days after initial receipt of the request, due to the magnitude/difficulty in the request, the RAO may petition the Supervisor of Records for an extension of time. (c. 66, § 10(c)) Upon a showing of good cause, the Treasury may receive up to 20 additional business days.

If the Treasury is unable to or declines to provide a record, they may petition to the Supervisor of Records for a modification or a waiver. This petition may include a request for extension of time to furnish copies of the requested records, to waive statutory limits to fees, or to waive the obligation to provide records in response to a request that was frivolous.